BEFORE THE

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

DEPARTMENT OF INDUSTRIAL RELATIONS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **KNUTH HINGE CO.** 561 Scobie Street Montague, CA. 96064 Employer	DOCKET 95-R2D3-2177 **DECISION**

Background and Jurisdictional Information

Employer is a hinge manufacturer. On April 11, 1995, the Division of Occupational Safety and Health (the Division), through Dennis Barker, Safety Engineer, conducted an accident investigation at a place of employment maintained by Employer at 561 Scobie Street, Montague, California (the site). On May 16, 1995, the Division cited Employer for an alleged general violation of § 4206(a) [pull back device on power operated press] of the California industrial safety orders found in Title 8, California Code of Regulations[1] and proposed a $150 civil penalty.

Employer filed a timely appeal contending that the safety order was not violated.

This matter came on regularly for hearing before Bref French, Administrative Law Judge for the California Occupational Safety and Health Appeals Board, at Yreka, California, on January 8, 1997. Employer was represented by Grace Kandor, Controller. The Division was represented by Dennis Barker, Safety Engineer. Oral and documentary evidence was introduced by the parties and the matter was submitted on January 8, 1997.

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[1] Unless otherwise specified all references are to sections of Title 8, California Code of Regulations.

Law and Motion

At the hearing, Employer moved, without objection from the Division, to expand the scope of its appeal to include the independent employee action defense. Good cause appearing therefor, the motion was granted.

Docket 95-R2D3-2177

Citation 1, General, § 4206(a)

Summary of Evidence

Employer was cited for not ensuring that an employee used a point of operation pull back device while operating a power operated press.

Dennis Barker testified for the Division that as an associate safety engineer he conducted an inspection on April 11, 1995, as the result of Employer's report of an accident involving a 15 ton Diamond press that caused the amputation of three finger tips on the right hand of an employee, Jamie Clifford. According to Dave Kotsch, who identified himself as Employer's President, Mr. Clifford was injured when the press closed down on his fingers while he was operating it without the use of pull back or restraint devices. Grace Kandor, who identified herself as Employer's Controller, showed him the press involved in the accident, which he photographed (Exhibit 2). A yellow sticker which had information about the use of the press's safety devices was affixed to the press. He also reviewed Employer's safety program, which he stated, "met the minimum requirements."

During the inspection, Mr. Barker observed pull back devices on the press which did not appear to him to have been recently installed, but rather to have been on the press for "some time." He has seen these types of safety device on other presses that he has inspected and usually they are custom designed to fit the particular press. He concurred with the statement "Our pull-back devices are custom-engineered for the press to which they are to be applied." which appears in a letter from the manufacturer of the restraint devices (Positive Safety Manufacturing Company: Exhibit A).

Jamie Clifford testified for the Division that two or three months before his accident, he was hired by Employer to clean parts and to operate the punch presses. He testified that he was never trained by

Employer in the use of any pull back devices and was not told to wear them while operating the punch press. He stated that he "did not know what they were for" and that other presses that he operated for Employer did not have pull back devices.

On March 30, 1995, he was injured while hand feeding metal pieces into the press (depicted in Exhibit 2) without using any pull back devices. He had used that press before "once or twice, briefly" but had not been trained to operate it although he could do so through "common sense" since all of the presses operated in a similar manner. He was not shown any restraining devices to protect his hands.

Mr. Clifford acknowledged on cross examination that on his first day of employment Mr. Kotsch took him on a tour of the plant and told him that "it was a dangerous place to work and that he needed to be aware." Mr. Kotsch also demonstrated how the punch press operated by making a few sample pieces. He recalled working on the punch press and in the cleaning area the first day of employment. Mr. Kotsch also told him to wear safety goggles while operating the punch presses and might have told him that he would be disciplined for not wearing them. He was not told by Mr. Kotsch, or anyone else, to use pull back devices while operating the punch press

David Kotsch testified for Employer that as Employer's President he interviewed Mr. Clifford on January 18, 1995, at which time he took him on a tour of the plant and showed him how the various pieces of equipment operated. He also explained the general working conditions and dangers inherent in the type of work done by Employer. On Mr. Clifford's first day of work (January 23, 1995,) he showed him the safety equipment in the shop and how to operate the punch presses. At that time Mr. Kotsch instructed him in the use of the restraint or pull back devices as well as told him that he was required to use the pull back devices when operating the punch press. He then assigned him to clean hinge pins. A new employee is typically put to work in the clean parts area to get accustomed to the equipment and so that Employer can observe how well the employee adheres to safety.

New employees are usually not put to work on the punch presses until a month into their employment. Mr. Clifford started working on the punch presses one month after he was hired. At that time, Mr. Kotsch again showed him the press's safety equipment, which included instruction on the pull back devices and proximity guards which are barriers to keep the operator's hands out of the danger zone. He had Mr. Clifford sit in the operator's seat and put the pull back devices on while he explained that the devices would pull an operator's hands

back from the danger zone. Mr. Clifford appeared to understand how to use the pull back devices. At various times other employees also instructed Mr. Clifford in the use of pull back devices during the "set-up" procedures for a particular job.

Pull back devices have been on the press depicted in Exhibit 2 continuously since July, 1993, and were on it when Mr. Clifford used it. Mr. Kotsch has used the pull back devices on that press. There is also a yellow sticker on the press depicted in Exhibit 2 that warns the operator, in effect, that "it is unlawful or a violation to not wear or to not use the pull back safety devices."

On January 1, 1995, Mr. Kotsch conducted a safety meeting with the shop employees where he discussed the use of pull back devices, as noted in Employer's Safety Meeting Minutes (Exhibit C). On March 24, 1995, Mr. Kotsch conducted a safety meeting at which Mr. Clifford was present along with Dean Jones, Employer's night shift leadman. Because it was the first work day for the new night shift crew, he stressed the need for additional caution and re-iterated that employees must use the pull back devices and wear safety goggles (as noted on Exhibit D: Safety Meeting Minutes). All of the employees appeared to understand these instructions.

David Setzer testified for Employer that he has been Employer's shop foreman for the last 6 years of his 12 years of employment and supervised Mr. Clifford when he was on the day shift. It is standard procedure for new employees to work in the parts cleaning area before being allowed to operate the presses. Mr. Clifford worked in the parts cleaning area for approximately one month before being assigned to work on the presses. Mr. Setzer showed Mr. Clifford how to operate the press depicted in Exhibit 2 during routine "job set ups" (when the die is set up to fit the press for a certain job) as well as to operate other presses which have similar safety equipment and pull back devices. When doing so, he would make certain that the safety devices were on the press and would explain to Mr. Clifford how to use them, which included instruction on use of the pull back devices.

On several occasions when Mr. Clifford was operating punch presses on the day shift, Mr. Setzer saw him use different types of safety devices, including pull back restraints. On one job involving snap hinges, he saw him use the pull back devices while making 4000 parts. He recalled seeing Mr. Clifford use the pull back devices on the press depicted in Exhibit 2 on one occasion. Several times, he saw him use pull back devices that operate the same way as the devices on the press involved in the accident. To his knowledge, Mr. Clifford

operated the presses several weeks before he went on the night shift. He considered Mr. Clifford "fairly experienced" in the use of the press and the safety devices on the press.

Employer's presses have several safety features. There are guards around the rams of the press so that an operator cannot put his hand under the ram when the press is engaged. The safety pull back devices, which are adjusted to certain lengths, tie onto an operator's wrists and "jerk" his hand back so that it will not be under the ram when it comes down. The presses also have two safety buttons that require the operator to use both hands to activate the rams.

Since Mr. Setzer was responsible for seeing that employees operate Employer's seventeen presses safely, he would routinely check to see if they were using the safety equipment properly. If an employee failed to use the pull back devices, he would be sent to Mr. Kotsch for disciplinary action. Under Employer's disciplinary procedures, an employee will receive a written warning for his or her first violation, then 3 days off without pay for a second violation, and will be terminated for a third offense. Employees are advised of this at monthly safety meetings.

Dean Jones testified for Employer that he has worked for Employer for 3 1/2 years. During this time, the press depicted in Exhibit 2 has always had pull back devices on it which functioned properly when he used them. He described the various built in safety features on the presses, such as the pull back devices ("hand pulls"), guards and palm trips or levers that are engaged simultaneously with both hands to activate the press. On March 24, 1995, he attended the safety meeting that Mr. Kotsch conducts every month as part of Employer's "zero tolerance" approach to safety violations. At that meeting, Mr. Kotsch discussed use of the pull back devices, safety guards and goggles. He told Mr. Jones to let any employees on the new night shift crew go home if they felt tired. Mr. Jones confirmed that employees knew that they would be disciplined if they did not use the safety devices.

As the night shift leadman, Mr. Jones supervised the other three employees and was responsible for ensuring that they did their jobs in a "safe and timely manner." If not, he would report them to Mr. Kotsch for disciplinary action, such as "sending the employee home." Mr. Clifford was operating the press (depicted in Exhibit 2) on a job that was continued from the day shift so Mr. Jones had not conducted the set-up procedures with him but he knew the machine was functioning properly.

Mr. Jones was not watching Mr. Clifford work at the time of the accident, because he was approximately 100 feet away operating another machine and would have had to leave his position to see Mr. Clifford since another press was partially blocking his view. Based on having seen Mr. Clifford use pull back devices while operating other presses, Mr. Jones opined that Mr. Clifford knew how to use the pull back devices on that press and was experienced in operating the press prior to going onto the night shift.

Grace Kandor testified for Employer that as Employer's controller she is responsible for keeping the corporate tax records and documents that are generated during the normal course of business. In 1993 Employer purchased a $1140 custom made pull back device, serial number 64940, and installed it on the 15 ton Diamond press depicted in Exhibit 2, as evidence by a letter from the manufacturer (Positive Safety Manufacturing Company, dated November 13, 1992: Exhibit A) and the attached invoice, dated March 12, 1993 (Exhibit A: attachment). The serial number on the pull back devices is displayed on a metal tag on the press which Ms. Kandor confirmed matches the number on the invoice, which is kept for tax purposes since the devices are a depreciable corporate asset.

Findings and Reasons for Decision

EMPLOYER PROVIDED POINT OF OPERATION SAFETY PULL BACK DEVICES FOR THE 15 TON DIAMOND PRESS INVOLVED IN AN INJURY ACCIDENT AND TRAINED THE INJURED EMPLOYEES TO USE THE DEVICES WHEN OPERATING THE PRESS. EMPLOYER SUSTAINED ITS BURDEN OF ESTABLISHING THE INDEPENDENT EMPLOYEE ACTION DEFENSE.

§ 4206(a) states that:

> "The employer shall provide and ensure the use of properly applied and adjusted point of operation devices or guards for every operation performed on a power operated press."

It is undisputed that the 15 ton Diamond press (depicted in Exhibit 2) was power operated. Employer submitted documentation and testimony through its controller, Grace Kandor, that substantiated its claim that at the time of the accident the press was equipped with

point of operation pull back devices. The pull back devices, which had been custom made by the manufacturer (Exhibit A: letter from Positive Safety Manufacturing Co.) with serial numbers recorded on them that matched the purchase invoice number (Exhibit A: attachment), were installed by Employer in July, 1993. The hearsay content of the letter and invoice, made at or near the time of the transactions they reference and kept during the regular course of business, would be admissible over a hearsay objection in a civil proceeding by virtue of the business records exception to the hearsay rule. (See Evidence Code Section 1271.[2]) Ms. Kandor's testimony identifying the records and their mode of preparation establishes their trustworthiness.

Other Employer witnesses, in particular Mr. Kotsch, Employer's corporate president, and Mr. Jones, Employer's night shift leadman, testified credibly that the pull back devices were in place on the press and functioning properly prior to and at the time of the accident. The Division's safety engineer testified that the pull back devices that he photographed on the press on April 11, 1995, appeared to have been there "for some time." The Division did not dispute that the devices were custom made to accommodate that press. Both Mr. Jones and Mr. Setzer described the multiple safety features on Employer's seventeen presses, which included guards around the rams of the press, pull back or restraint devices, barrier guards, palm trips and safety buttons that require the operator to use both hands to activate the rams. In light of the evidence presented, it is highly unlikely that

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[2]Evidence Code Section 1271 provides that:

> "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:
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> (a) The writing was made in the regular course of a business;
>
> (b) The writing was made at or near the time of the act, condition, or event:
>
> (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and
>
> (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

Employer's presses did not have pull back devices, as Mr. Clifford testified. Therefore, Mr. Clifford's testimony on that issue is discredited.

Employer did not dispute that Mr. Clifford received a serious injury as a result of operating the press without using pull back devices but contended that it did everything that it could to ensure that its employees used the point of operation pull back devices. Employer contends that the violation was the result of misconduct on the part of the injured operator and that it is excused from liability under the "independent employee action defense" as articulated by the Appeals Board in Mercury Service, Inc., OSHAB 77-1133, Decision After Reconsideration (Oct. 16, 1980).)

Satisfactory proof establishing each of the five elements of the defense[3] may insulate an employer from the unsafe acts of employees who "act against their employer's best safety efforts." The rationale of the defense is that an employer cannot anticipate its employee's failure to follow instructions and its safety rules. (Ernest W. Hahn Inc., OSHAB 77-576, Decision after Reconsideration (Jan. 25, 1984).) Because it is an affirmative defense (Ernest W. Hahn, Inc. supra.), the burden of proving each element by a preponderance of the evidence rests upon the employer. (Central Coast Pipeline Construction Company, Inc., OSHAB 76-1342, Decision after Reconsideration (July 16, 1980).)

With respect to the first element of the defense, in Solar Turbines, Inc., OSHAB 90-1336, Decision After Reconsideration (July 13, 1992), the Appeals Board's held that "experience"[4], within the

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[3] Those elements are:

1. The employee was experienced in the job being performed;

2. The employer has a well-devised safety program which includes training employees in matters of safety respective to their particular job assignments;

3. The employer effectively enforces the safety program;

4. The employer has a policy of sanctions against employees who violate the safety program; and

5. The employee caused a safety infraction which he or she knew was contra to the employer's safety requirement.

[4] Webster's Third New International Dictionary defines "experienced" as "having experience; made skillful or wise through observation of or participation in a particular activity or in affairs generally."

context of the defense, is only valuable to the degree that skill and knowledge are acquired as a result of that experience.

In terms of the extent of Mr. Clifford's experience operating the punch presses, Mr. Kotsch's testimony was the most compelling, cogent and direct. He testified that based on Employer's personnel records and from his first hand knowledge as Employer's safety instructor, Mr. Clifford's training and instruction began when he was interviewed on January 18, 1995. At that time, he was taken on a tour of the plant and given general instruction on how the various pieces of equipment operated and the dangers inherent in the type of work done.

When Mr. Clifford was hired on January 23, 1995, Mr. Kotsch demonstrated how the punch press operated and instructed him in the use of the pull back devices as well as told him that he was required to use the pull back devices when operating the punch press. Mr. Clifford was assigned work in the clean parts area to get accustomed to the shop's tools and equipment and so that Employer could observe how well he adhered to safety.

It can reasonably be inferred that Employer was confident that Mr. Clifford could successfully operate the punch presses when he put him to work on them after one month. Employer established through the credible testimony of Mr. Kotsch and David Setzer, Employer's shop foreman, that this was a typical progression for new employees. Prior to beginning work on the presses, Mr. Kotsch again showed Mr. Clifford the safety equipment which included instruction on the restraint devices and proximity guards. He had Mr. Clifford sit in the operator's seat (depicted in photograph Exhibit 2) and put the pull back devices on his wrists while he explained how they would pull his hands back from the danger zone. Mr. Clifford appeared to him to have no difficulty in understanding how to use the pull back devices. Furthermore, even though the warning sign depicted on the face of the press in photograph Exhibit 2 is not a substitute for proper training (see TWS, Inc. OSHAB 91-031, Decision After Reconsideration (Jan. 16, 1992).), its placement there substantiates Employer's good faith effort to warn and advise its employees that pull back devices must be utilized.

Other employees, such as Mr. Jones, showed Mr. Clifford the "set up" procedures for various jobs on other presses, which Mr. Kotsch stated, routinely included instructions on safety and the use of the pull back devices. Mr. Setzer testified that as the day shift supervisor, he would make certain that the safety equipment and devices were on the various presses. He showed Mr. Clifford how to

operate the 15 ton Diamond press, as well as other presses which have similar pull back devices.

On January 1, 1995, Mr. Kotsch conducted a safety meeting with its shop employees where he discussed the use of safety devices, including the pull back devices, as noted in Employer's Safety Meeting Minutes (Exhibit C). On March 24, 1995, he conducted a safety meeting at which Mr. Clifford was present (Exhibit D: Safety Meeting Minutes and attendance record). Because it was the first work day for the new night shift crew, he stressed the need for additional caution due to possible fatigue from working at night (3:30 p.m. to midnight) and re-iterated that employees must use the pull back devices and wear safety goggles (as noted on the Safety Meeting Minutes).

That Employer conscientiously undertook a course of safety training and instruction that included evaluating an employee's progress in gaining work experience and confidence around admittedly hazardous equipment, mitigates against Mr. Clifford's claim that he was immediately put to work on the presses on his first day on the job. Not only is this inherently improbable, other witnesses with supervisorial responsibilities, refuted this contention. Mr. Setzer, for example, testified credibly that it was "standard procedure" for new employees to work in the parts cleaning area before being allowed to operate the presses. He confirmed that Mr. Clifford worked in the parts cleaning area for approximately one month before beginning work on the presses.

In contrast to Employer's witnesses, Mr. Clifford appeared reluctant to provide details that he should have been able to recall more readily and his memory was vague with respect to his work assignments. He could not recall the precise time frame that he worked on the various punch presses before his accident or accurately state the length of time that he worked for Employer, which he estimated at "two or three months." On cross examination, he stated that he was told to wear safety goggles and "might have been advised" about possible disciplinary action for not wearing them. He claimed that Mr. Kotsch only made "a few [sample] pieces" to demonstrate how the press operated and denied that he was trained on the presses or provided any safety instructions.

However, Mr. Clifford's rational to explain how he was able to operate the presses, to wit, that he used "common sense" because the presses were all similar, does not ring true. It can reasonably be inferred that Employer would not have approached the matter in such a lackadaisical manner, given the dangers presented by the presses, and

that an employee could not operate the equipment without instruction on the many safeguards and safety features built into the press to protect the operators. Furthermore, given the frequency at which Mr. Clifford must have operated the presses on both the day shift and night shift, it is unlikely that his failure to use pull back devices would have gone undetected for such a long period of time, had he habitually not used them, as he testified, because he "didn't know what they were for."

It is helpful in resolving the conflict in the testimony of the Division's and Employer's witnesses to note that in a number of cases the Appeals Board has examined the frequency of performance of a particular task to determine its effect on the evaluation of a workers' level of experience. In Whitney Farms, OSHAB 76-914, Decision After Reconsideration (July 24, 1978), a farm worker was electrocuted after he accidentally raised a metal irrigation pipe into contact with a overhead high voltage power line. The Board found that the employee was experienced for purposes of the first prong of the Mercury Service test: "... the deceased worker was experienced having irrigated the field where the accident occurred approximately 50 times without incident over several years of employment." And in Fisher Transport, OSHAB 90-726, Decision After Reconsideration (Oct. 16, 1991), a truck driver had made more than 3200 deliveries of caustic material without incident over a period of three years.

A more recent case, Sacramento Bag Mfg. Co., OSHAB 91-320, Decision After Reconsideration (Dec. 11, 1992), where the Appeals Board found an apprentice press operator not experienced enough to meet the first element of the Mercury Service test, can be distinguished. There the injured employee had been working for only five days on a press that had been slowed down by 50% to accommodate his lack of experience and he was not allowed to work alone.

According to Employer's employment records and the uncontradicted testimony of its witnesses, by March 30, 1995, the date of the accident, Mr. Clifford had been working on the presses approximately five weeks from February 23rd (one month after he was hired on January 23, 1995). It can reasonably be inferred from the evidence that using a press to punch out various metal hinges and parts is fairly repetitious work and not a complex task to master. It would not be difficult for Mr. Clifford to gain the appropriate experience in a short period of time. Mr. Setzer stated that on one job involving snap hinges, he saw Mr. Clifford use the pull back devices while making some 4000 parts. As a result of observing Mr. Clifford operate

the presses for several weeks before he went onto the night shift, he considered Mr. Clifford to be "fairly experienced" in the use of the press and its safety devices. Based on his personal knowledge from having seen Mr. Clifford operate presses other than the one involved in the accident, Mr. Jones concluded that Mr. Clifford was experienced in operating the 15 ton Diamond press and in using the pull back devices prior to going onto the night shift.

Therefore, in light of the all of the foregoing evidence, it is found that Employer established that Mr. Clifford was experienced in the job being performed to wit, operating the 15 ton Diamond punch press. Employer presented convincing proof, to a preponderance, that the training provided by Employer, coupled with the length of time Mr. Clifford operated the 15 ton Diamond press, and other similarly functioning presses, was sufficient for him to acquire the necessary experience to make him proficient in the assigned task.

In support of its contention that it has a well devised safety program which includes training employees in matters related to their job assignments (the second element), Employer established that it holds regular monthly safety meetings with its employees. According to Employer's Safety Meeting Minutes (Exhibit D), use of the press pull back devices was specifically discussed at a safety meeting attended by Mr. Clifford approximately one week before the accident as well as at a previous meeting for all shop personnel (Exhibit C). Mr. Jones recalled that at the March 24, 1995, safety meeting Mr. Kotsch discussed use of the pull back devices, safety goggles and safety guards. Safety engineer Barker reviewed Employer's safety program, which he stated, "met the minimum requirements."

There was also ample uncontradicted evidence that Employer effectively enforced its safety program (the third element) and that it does so through a policy of progressive sanctions (the fourth element). Mr. Setzer testified credibly that, as the shop foreman, he was responsible for enforcing Employer's safety rule regarding use of the pull back devices. He stated that Employer's disciplinary program was enforced for safety violations by a written warning for a first time offense, time off without pay for a second violation, and termination for a subsequent offense. Employees were made aware of this sanction policy at safety meetings. Mr. Jones, the night shift leadman, described Employer's safety attitude as one of "zero tolerance" and stated that employees would be disciplined for safety infractions. In fact, Mr. Clifford himself was given a warning for not wearing safety glasses (Exhibit B).

Finally, Employer proved that Mr. Clifford was aware that he was violating an established safety rule (the fifth element) and acted contrary to Employer's requirement that employees use the pull back devices while operating the punch presses. Employer's business records establish that Mr. Clifford was present at one or more safety meetings where use of the pull back devices was discussed.

Mr. Clifford's awareness is further corroborated by the testimony of Mr. Setzer and Mr. Jones, who as supervisory personnel were in a position to observe Mr. Clifford's work activities. Mr. Setzer testified credibly that he observed Mr. Clifford use different types of safety devices, including the pull back restraints, while operating other presses with similar safety features as the 15 ton Diamond press involved in the accident. At least once he saw Mr. Clifford use the pull back devices on the 15 ton Diamond press. He recalled that on one job involving snap hinges, he saw Mr. Clifford use the pull back devices while making 4000 parts. Both he and Mr. Kotsch showed Mr. Clifford how to use the pull back devices during training and job set-up demonstrations. Mr. Jones testified that he believed that Mr. Clifford knew how to use the pull back devices because he had seen him use them on other presses.

The testimony of Employer's witnesses was more convincing than that of Mr. Clifford, who claimed that the 15 ton Diamond press did not have any pull back devices. Either his memory is faulty or his assertion false in that it is highly unlikely that pull back devices were installed on the 15 ton Diamond press in the short period of time between the accident and the inspection when the press was photographed by Mr. Barker with the pull back devices in place (Exhibit 2). In light of Employer's invoice for the pull back devices from the manufacturer, dated March 11, 1993, and the testimony of Employer's witnesses who viewed and used the pull back devices on the press prior to the accident, Mr. Clifford's testimony is discredited. Furthermore, Mr. Barker opined that it appeared to him that the devices had been on the press for "some time."

It can also reasonably be inferred from viewing Exhibit 2 that the pull back devices would attract the attention of any press operator since they protrude out from the machine on long fixed rods with attached wrist cuffs that dangle from a cord at the end where an operator would have his or her wrists positioned if s/he were sitting in the operators chair. It would be obvious and should have been apparent to Mr. Clifford that their use was intended while operating the press. In addition the yellow sticker on the press that, according to Mr. Kotsch, warns the operator that "it is unlawful or a violation to

not wear or to not use the pull back safety devices" is clearly visible on the press (Exhibit 2).

Taken together, those business records, photographs and statements are sufficient to establish that Mr. Clifford knew he was acting contrary to one of Employer's safety requirements when he failed to use the pull back devices while operating the press on March 30, 1995. Employer has therefore established the required elements of the independent employee action defense.

Decision

The appeal is granted and the proposed civil penalty hereby set aside.

DATED: February 4, 1997

BREF FRENCH
Administrative Law Judge